Supreme Court, U.S.
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No. 97-1520

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

AT&T CORP., *et al.*,
Petitioners,

v.

IOWA UTILITIES BOARD, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

SUPPLEMENTAL BRIEF OF PETITIONERS

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SUPPLEMENTAL BRIEF

Petitioners file this supplemental brief pursuant to Supreme Court Rule 15.8 to "call[] [the Court's] attention to [a] new case[]." On March 20, 1998, the D.C. Circuit issued a decision that strongly underscores the importance of granting this petition and scheduling this case to be heard in October 1998, in connection with *AT&T, et al.* v. *Iowa Utilities Board*, No. 97-826 (and related cases). See *SBC Communications, Inc.* v. *Federal Communications Commission*, No. 97-1425 (D.C. Cir. March 20, 1998).[1]

The D.C. Circuit has now held that under section 271(d)(3) of the Telecommunications Act of 1996 ("1996 Act"), the Federal Communications Commission ("FCC") is required to "conclude[] to its own satisfaction" that a Bell Operating Company ("BOC") seeking long distance authorization has met each of the "statutory requirements" set forth in section 271, and that, in so doing, "the statute does not require the FCC to give the State commissions' views any particular weight." *SBC Communications*, slip op. at 12-13. The D.C. Circuit's decision clearly conflicts with the Eighth Circuit's analysis of section 271 in the mandamus decision under review. The Eighth Circuit prohibited the FCC from making its own determination of whether a BOC had satisfied the 1996 Act's pricing requirements, and instead required the FCC to defer to state commissions' pricing determinations in acting upon section 271 applications. Thus, the FCC now must obey an Eighth Circuit order to defer to state commission pricing decisions in ruling on section 271 applications, knowing all the while that the D.C. Circuit, which has exclusive jurisdiction to

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[1] Fifteen copies of the decision have been lodged with the Court.

review the FCC's section 271 orders, has interpreted section 271 to require the FCC to "conclude[] to its own satisfaction" that federal statutory requirements have been met. These conflicting interpretations of section 271 heighten the probability that, if argument on this matter is not heard in the Fall, it will have to be addressed by the Court in the rushed and abbreviated context of emergency stay applications in connection with future Section 271 applications.

In *SBC Communications*, the D.C. Circuit affirmed the FCC's decision under section 271(d)(3) that SBC Communications had not satisfied section 271(c)'s threshold requirement that a BOC meet conditions set forth in subsections 271(c)(1)(A) or 271(c)(1)(B), known as Track A and Track B. Those provisions require that a BOC seeking long-distance authorization under Section 271 either demonstrate the presence of a facilities-based competitor in its local market or demonstrate that the absence of such a competitor is solely attributable to the fact that no carrier is seeking to become a facilities-based local competitor. See 47 U.S.C. §§ 271(c)(1)(A), 271(c)(1)(B). The court of appeals rejected SBC's argument that the FCC is obligated to defer to a state commission decision that the BOC has satisfied Track A. It held that, to the contrary, section 271(d)(3) requires the FCC to make its own judgment whether all of Section 271's statutory requirements have been fulfilled:

> Nor is the Commission obliged to defer to the [state commission's] judgment that SBC satisfied Track A. Although the Commission must consult with the State commissions, the statute does not require the FCC to give the State commissions' views any particular weight. Unless the FCC concludes to its own satisfaction that the applying BOC has satisfied either Track A or Track B, *as well as the other statutory requirements*, it "shall

> not approve the authorization." 47 U.S.C. section 271(d)(3). *Louisiana Public Service Commission v. FCC*, 476 U.S. 355 (1986), which holds that matters in connection with intrastate service are "fence[d] off from FCC reach," simply does not apply in this case. Congress has clearly charged the FCC, and not the State commissions, with deciding the merits of the BOCs' requests for interLATA [long distance] authorization, and interLATA service is typically *interstate*. For these reasons, we uphold the Commission's determination that SBC's application did not satisfy Track A's requirements.

Id., slip op. at 12-13 (first emphasis added).

The D.C. Circuit's decision is in direct conflict with the Eighth Circuit's analysis of section 271(d)(3). Like the D.C. Circuit's decision, the Eighth Circuit's decision addressed section 271's requirement that "the FCC shall not approve" an application for long distance authorization unless certain conditions are met. The D.C. Circuit decision specifically addressed the condition that an applicant for long distance authorization satisfy Track A or Track B (sections 271(c)(1)(A), (B)), while the Eighth Circuit decision addressed the condition that an applicant meet statutory pricing requirements for access to essential facilities and services (section 271(c)(2)(B)). But while the D.C. Circuit held that "Congress has clearly charged the FCC, and not the State commissions, with deciding the merits of the BOCs' requests for interLATA authorization" and that the FCC is not required "to give the State commissions' views any particular weight" in determining whether the requirements of Track A, Track B, or the "other statutory requirements" have been met, *SBC Communications*, slip op. at 12-13, the Eighth Circuit held that the FCC's section 271(d)(3) authority with respect to critical

pricing issues is restricted to determining whether the relevant state commission believes that the BOC is charging prices that satisfy the federal pricing requirements.

The FCC is thus now subject to two conflicting mandates. The Eighth Circuit has forbidden it to make its own judgment whether a section 271 applicant has satisfied federal statutory pricing requirements and required it instead to accept state commission determinations. But the D.C. Circuit has expressed the contrary (and, we believe, correct) view of the FCC's authority and statutory obligations, and the D.C. Circuit has exclusive jurisdiction to review FCC orders on section 271 applications. See 47 U.S.C. § 402(b)(6, 9). This makes it even more probable that, if the Court does not hear argument on the question in the Fall, the issue will be brought to it thereafter through emergency stay applications. See Petition, pp. 24-25.

For these reasons, and those stated in the petition, the writ of certiorari should be issued and the case should be scheduled to be heard in connection with the petitions that have already been granted arising out of the same case.

Respectfully submitted,

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